Frontier Corporation

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DOCKET FILE COPY ORIGINAL

August 25, 1997

BY OVERNIGHT MAIL

Mr. William F. Caton
Office of the Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: CC Docket No. 96-128

Dear Mr. Caton:

Enclosed for filing please find a original plus eleven (11) copies of the Comments of Frontier Corporation in the above-docketed proceeding.

To acknowledge receipt, please affix an appropriate notation to the copy of this letter provided herewith for that purpose and return same to the undersigned in the enclosed, self-addressed envelope.

Very truly yours,

Michael J. Shortley, III

Michael J. Shortley, III

cc: International Transcription Service

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996	))))	CC Docket No. 96-128

**COMMENTS OF
FRONTIER CORPORATION**

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Summary

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Despite this curious spin, the Commission must: (a) adopt a per-call compensation rate that accurately reflects the costs of access code and subscriber 800 calls -- in the range of ten cents per call; and (b) scrap its interim compensation plan or design one that fully addresses the deficiencies found by the Court in the Commission's orders. Unfortunately, the "limited aspects" of the orders are fundamental underpinnings that render the other sections unimplementable until the deficiencies are corrected.

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COMMENTS OF FRONTIER CORPORATION

Introduction

Frontier Corporation ("Frontier") submits these comments in response to the Commission's Public Notice inviting comments on remand.[1] In its Public Notice, the Commission's Staff places a curious spin on the result of the D.C. Circuit's rejection[2] of the Commission's payphone orders.[3] Rather than admitting that its orders were found to be deficient in virtually every respect, the Notice merely states that only certain limited aspects of the Commission's orders were found to be "potentially arbitrary."[4]

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1 *Pleading Cycle Established for Comments on Remand Issues*, Public Notice, DA 97-1673 (August 5, 1997) ("Notice").

2 *Illinois Public Telecommunications Ass'n v. FCC*, No., 96-1394, slip op. (D.C. Cir. July 1, 1997) ("IPTA").

3 *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Dkt. 96-388, Report and Order, FCC 96-388 (Sept. 20, 1996) ("Order"); *id.*, Order on Reconsideration, FCC 96-439 (Nov. 8, 1996) ("Reconsideration").

4 Notice at 2.

Despite this curious spin, the Commission must: (a) adopt a per-call compensation rate that accurately reflects the costs of access code and subscriber 800 calls -- in the range of ten cents per call; and (b) scrap its interim compensation plan or design one that fully addresses the deficiencies found by the Court in the Commission's orders. Unfortunately, the "limited aspects" of the orders are fundamental underpinnings that render the other sections unimplementable until the deficiencies are corrected.

Argument

I. THE COMMISSION SHOULD ESTABLISH A PER-CALL COMPENSATION RATE IN THE RANGE OF TEN CENTS PER CALL.

In its payphone orders, the Commission attempted -- but failed -- to establish a cost-based compensation rate.[5] The Commission should continue this effort because it is mandated by section 276 of the Communications Act of 1934, as amended by the Telecommunications Act of 1996 ("Act"). Alternative theories of compensation are legally and factually insupportable and would, if properly applied, produce no different result in any event. When the evidence is fully examined, the Commission must conclude that the costs of coinless calls are substantially less than the costs of coin calls and set the per-call compensation rate accordingly.

[5] *IPTA* at 13-16.

A. The Commission Must Establish a Cost-Based Per Call Compensation Rate.

In its payphone orders, the Commission attempted to establish a per-call compensation rate equivalent to the deregulated local coin rate on the basis that "the cost[s] of originating the various types of payphone calls are similar."[6] The Commission apparently recognized that cost is the appropriate basis for establishing a per-call compensation rate. The Commission, however, appears to have retreated from that position in the Notice when it asks for comment on "how these cost differences should affect a market-based compensation amount."[7] This apparent retreat -- if it is one -- is unjustified. The statute requires cost-based compensation. In any event, the adoption of a "market-based" compensation would produce no different result.

Section 276(b)(1)(A) of the Act requires the Commission to:

> establish a per call compensation plan to ensure that all payphone service providers are *fairly compensated* for each and every completed intrastate and interstate call using their payphone....[8]

Fair compensation requires a balancing of consumer and investor interests. While the Commission remains free to select the precise methodology through which it will set rates,[9] the end result must fairly balance consumer and

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6 Order, ¶ 70; *see also* Reconsideration, ¶ 71.

7 Notice at 2.

8 47 U.S.C. § 276(b)(1)(A) (emphasis added).

9 *Nader v. FCC*, 520 F.2d 182 (D.C. Cir. 1975).

investor interests.[10] This balance requires that investors (in this case, payphone owners) not be undercompensated for investment devoted to the payphone services at issue here -- access code and subscriber 800 calls. It also requires that consumers (in this case, carriers owing a compensation obligation and, ultimately, payphone users) not be overcharged for the services that they receive. The only appropriate balance is a cost-based measure.[11]

Congress declared that the purposes of section 276 were to "promote competition among payphone service providers and to promote the widespread deployment of payphone services to the benefit of the public...,"[12] in addition to ensuring fair compensation. A per-call compensation rate radically in excess of costs would plainly not be fair to carriers and, ultimately, consumers. It would certainly not promote efficiency and competition; rather, it would promote only the exploitation of locational monopolies. Finally, an above-cost compensation scheme would not "benefit the general public" that would ultimately be forced to absorb such fees.[13]

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10 *AT&T v. FCC*, 836 F.2d 1386 (D.C. Cir. 1988).

11 A cost-based regime, of course, does not mean that the Commission would have to conduct provider-by-provider rate-of-return proceedings, as has been suggested. *See IPTA,* Transcript of Proceedings at __ (May 13, 1997). Courts have traditionally recognized the ability of agencies to establish industry-wide measures of appropriate returns. *See, e.g., Permian Basin Area Rate Cases,* 390 U.S. 747 (1968).

12 47 U.S.C. § 276(b)(1).

13 Although the Commission rejected a "caller pays" compensation plan -- one of the few aspects of its orders that the Court upheld (*IPTA* at 20-22) -- the stark fact remains that the caller, *i.e.,* the payphone user, *will* ultimately pay. AT&T, among others, has already tariffed a payphone surcharge to recover payphone compensation. Other carriers, undoubtedly, will follow suit.

The so-called "market-based" approach advocated by the payphone service providers is untenable. Basing compensation on commissions paid for the O+ traffic they carry would effectively allow payphone providers to receive monopoly rents on *all* traffic, not merely O+ calls. A major reason why payphone providers are able to pay high commissions on O+ traffic is because of the captive nature of the audience. Few users will forego making a payphone call and, in the particular locations that they happen to be at the time, there typically are no other payphone providers operating, a fact that the Commission recognizes.[14] Moreover, relatively high commissions are merely passed through to end-users, often in the form of surprises when the customers receive their telephone bills. Exorbitant rates for calls made from payphones are a major source of complaints received by the Commission[15] and were a major reason that Congress passed the Telephone Operator Consumer Services Improvement Act ("TOCSIA").[16] The Commission should not base compensation levels on the rents that payphone providers are able to extract by virtue of their locational monopolies. Such a result would be patently unfair to payers and users alike, not to mention completely inconsistent with the goal of section 276 to provide fair compensation. In this case, the Commission has been singularly unfriendly to users of telecommunications services.

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14 Order, ¶ 15.

15 Fall 1996 Common Carrier Scorecard at 14-15.

16 *See* 47 U.S.C. § 226, Historical and Statutory Notes (Congressional finding that TOCSIA's safeguards governing operator services costs were intended "to assure fairness for consumers and service providers alike.")

More fundamentally, on closer analysis, the cost-based and market-based approaches produce the same result. As the Commission has consistently recognized, in a competitive market, rates will reflect the economic costs of providing service. The Commission's local competition orders, although largely vacated on jurisdictional grounds, strongly endorsed this principle.[17] Indeed, in its payphone orders, the Commission recognized this principle as well. Although the outcome was wrong, the Commission's decision to use a market-based approach to establish a cost-based compensation rate recognized that a competitive market will drive rates to cost.[18] Unfortunately, from the perspective of the end-user, the payphone market is not competitive. Thus, in the payphone context, a pure, "market-based" approach is neither feasible nor rational.

For these reasons, the Commission should continue its quest to find a cost-based compensation rate.

B. The Commission Should Establish a Cost-Based Compensation Rate in the Range of Ten Cents Per Call.

In remanding the Commission's 35 cent per-call default compensation rate, the D.C. Circuit observed:

> The problem with the FCC's decision is that the record in this case is replete with evidence that the costs of local coin calls versus 800 and access code calls are *not* similar. Numerous IXCs pointed out that

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17 *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* CC Dkt. 96-98, First Report and Order, FCC 96-325, ¶¶ 678-79 (Aug. 8, 1996), *vacated and remanded in part sub nom. Iowa Utilities Bd. v. FCC,* No. 96-3321, slip op. (8th Cir. July 18, 1997).

18 *See* Order, ¶ 152 (deregulating local coin rate to allow rates to be set on the basis of amount agreed upon by "a willing seller and a willing buyer.")

> the costs of coin calls are higher than those for coinless calls because of the costs typically associated with use of coin equipment (*e.g.*, the costs of purchasing the equipment and coin collection).... In addition, IXCs showed that the costs of local coin calls are higher because the PSP bears the costs of originating *and* completing local calls (*i.e.*, the "end-to-end" costs); by contrast, for coinless calls, the PSP only bears the cost of *originating* the calls.... Even the APCC, a trade group for independent PSPs, acknowledged that the costs of coin calls are higher than those of coinless calls.... AT&T estimated that the costs of local coin calls are three times higher than those of coinless calls....[19]

The record amply supports the Court's conclusions. As the interexchange carriers demonstrated -- and the Court entirely credited:

> IXCs contended that these factors precluded the "market-based" approach. They further affirmatively relied on the BOCs' data showing that the BOCs' average per call costs are between $.25 and $.32. See, e.g., J.A. 1344-49. In particular, IXCs demonstrated that when the costs unique to local coin service are excluded from the BOCs' figures, the result is average cost figures for originating coinless calls that fall within AT&T's range of $.0595 to $.1073 per call. See JA 1348-49, 1353-54; see also J.A. 2013-14 nn. 6-7.[20]

The interexchange carriers also demonstrated:

> Beyond that, the evidence that the nation's largest IPP (Peoples Telephone) submitted showed that coin costs that are not incurred in originating coinless long distance calls account for over 40% of the cost of the average payphone call. In particular, Peoples' evidence indicates that coin equipment (11 cents per local coin call), coin collection (4.3 cents per call), and

19 *IPTA* at 14-15 (emphasis in original; citations omitted).

20 *Illinois Public Telecommunications Ass'n v. FCC*, No. 96-1394, Joint Brief of Interexchange Carriers at 13 (February 14, 1997).

> tariffed termination charges (4.2 cents) themselves account for 19.5 cents of the claimed average cost of 46 cents per call. 42% of the $.35 compensation rate selected by the FCC -- over $400 million annually -- is clearly a "significant" difference."[21]

In its order on remand, the Commission must confront this data. The D.C. Circuit's admonition is telling:

> The FCC failed to respond to any of the data showing that the costs of different types of payphone calls are not similar. Rather, the FCC's *Order* cavalierly proclaims that the costs of local coin calls versus 800 and access code calls are "similar," *without even acknowledging any of the contrary data. See Order*, ¶ 70. The agency's order on *Reconsideration* recognizes that at least some parties had argued that the costs of coin calls are not "similar" to those of 800 and access code calls; but the FCC then dismissed the argument with two words -- "We disagree" -- and never provided any reason for its "disagreement." *See Reconsideration* ¶ 71. The FCC's *ipse dixit* conclusion, coupled with its failure to respond to contrary arguments resting on solid data, epitomizes arbitrary and capricious decisionmaking. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 46-57 (1983).[22]

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21 *Illinois Public Telecommunications Ass'n v. FCC*, Joint Reply Brief of All Interexchange Carrier Petitioners and Intervenors at 6-7 (April 14, 1997).

See also id. at 5 ("...AT&T and MCI each demonstrated below that the costs of originating coinless calls were some $.06-.08 per call, which is radically lower than the FCC's assumed $.35 cost of local coin calls (or the RBOCs' claimed $.25-$.32.").

22 *IPTA* at 15.

The fact that the FCC's rate was only a default rate did not save it from being arbitrary. *See id.* at 16 ("Thus, at a minimum, the IXCs are entitled to a default rate that is reasonably justified, so that they are not forced to resort to blocking only because the default rate has been set at an unreasonable level.").

The record evidence demonstrates that an appropriate, cost-based, per-call compensation rate should be in the range of ten cents per call. The Commission should act accordingly.[23]

II. THE COMMISSION MUST ABANDON, OR IN THE ALTERNATIVE, RADICALLY MODIFY ITS INTERIM COMPENSATION PLAN.

Section 276 of the Act only required the Commission to adopt regulations to implement its provisions.[24] It did not require compensation to commence on any particular date. Moreover, the D.C. Circuit found fault with each and every aspect of the Commission's interim plan. In these circumstances, the Commission should abandon any effort to resurrect its interim compensation plan and focus its efforts on getting the permanent, per-call plan right. In the alternative, if the Commission wishes again to adopt an interim compensation plan, it must adopt one that addresses the defects found by the D.C. Circuit in the plan that the Court remanded to the Commission.

A. The Commission Must Abandon Its Interim Compensation Plan.

Because the Court found that the Commission's interim compensation plan was completely deficient -- and it cannot fairly be resurrected in any event -- the Commission should concentrate its efforts on the future -- namely, getting the

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23 The Commission should also mandate a single, nationwide uniform rate. To permit a fluctuating rate on a payphone-by-payphone basis would result in a system that would be virtually impossible to administer.

24 47 U.S.C. § 276(b)(1) ("... the Commission shall take all actions necessary (including any reconsideration) to *prescribe regulations....*") (emphasis added).

per-call compensation rate right this time. There are no equitable reasons for the Commission to attempt to resurrect its now-defunct interim plan.[25]

First, interexchange carriers have expended -- and are continuing to expend -- millions and millions of dollars to develop the systems to track and pay for per-call compensation. They are doing so -- not for the purpose of offering new services and generating new revenues -- but solely to spend more money to pay "compensation." These costs are effectively unrecoverable and the Commission should strongly take these costs into account in balancing the equities.

Second, for the interim period, private payphone providers will continue to receive some compensation for the access code calls that they carry under the regime previously in effect.[26] Thus, payphone providers will not go completely uncompensated if the Commission declines to attempt to resurrect a compensation plan for the interim period.[27]

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[25] Although the Commission attempts to keep its interim plan in place pending a decision on remand (Public Notice at 1-2), it is plain that the Commission may not do so. *See Illinois Public Telecommunications Ass'n v. FCC*, No. 96-1394, Motion for Clarification or, in the Alternative, for Partial Rehearing (August 15, 1997).

[26] *See Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Communications Act of 1996*, CC Dkt. 96-128, Notice of Proposed Rulemaking, 11 FCC Rcd. 6716, 6722, ¶ 10 (1996).

[27] While the Bell companies would not receive compensation under the prior system, none have demonstrated that they are entitled to receive compensation under section 276 -- which established certain preconditions for their eligibility to receive compensation (*see* 47 U.S.C. § 276(a)) -- in any event. From the correspondence that Frontier has received, every Bell company is relying upon the conclusions of at least some of their state commissions that there were no payphone subsidies embedded in intrastate rates. However, because there were payphone *costs* embedded in intrastate rates, such a conclusion is a *non sequitur*. This Commission should make clear that the incumbent local exchange carriers are required -- as a precondition to receiving compensation -- actually to

Third, it is far from clear that such a restructuring would work or be particularly equitable. Given the turnover in payphone ownership, owners of many of the payphones for the period in question would not receive compensation. Conversely, others would receive compensation where none is due. It is doubtful that the Commission could now revamp a system so that payments made for the interim period would rationally relate to subscriber 800 and access code calls that particular carriers actually transported during that period from payphones actually owned by particular payphone service providers.

In sum, the Commission must abandon any effort to resurrect its now-defunct interim compensation plan.

B. In the Alternative, the Commission Must Design an Interim Compensation Plan That Corrects Each of the Deficiencies Identified by the Court of Appeals.

The D.C. Circuit found that the Commission's interim plan failed to survive scrutiny in four respects: (a) use of the default per-call rate as the basis for measuring interim compensation; (b) limiting the requirement to pay interim compensation only to twenty-two interexchange carriers; (c) basing each such carrier's contribution obligation on total toll revenues; and (d) failing to consider interim compensation for 0+ and inmate calls that were not otherwise compensated.[28]

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remove payphone costs from their intrastate rates, just as this Commission ordered them to remove payphone costs from their interstate rates. *See* Order, ¶ 183.

[28] *IPTA* at 16-20.

First, and rather obviously, the Commission must base any interim compensation plan on a final and *sustainable* per-call rate. Thirty-five cents per call, and the corresponding monthly rate of $45.85 per payphone, is far too high.[29]

Second, the Commission must adopt an interim plan that requires payment by *all* carriers that carried compensible calls, including the Bell companies. This is no small issue. The Bell companies themselves carry numerous compensible calls (*i.e.,* corridor, out-of-region interexchange and intraLATA toll calls). The amount of compensation that the Bell companies would have to pay would likely dwarf the compensation obligations of the smaller interexchange carriers that the Commission improperly excluded from its interim compensation plan. As to those calls, the D.C. Circuit observed:

> Yet, even assuming *arguendo*, that the FCC's limitation marginally increases administrative convenience, this limitation comes at a huge cost. For example, if small IXCs were included, they would be required to pay as much as $4 million *per month*. As the small IXCs concede, this amount is "far from *de minimis*."[30]

The Court was clear; the Commission must include *all* carriers, including the Bell companies, in any interim compensation plan.

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29 *See supra* at 6-9.

30 *IPTA* at 17.

Third, the Court made clear that the Commission cannot base any form of interim compensation on a carrier's *pro rata* share of total toll revenues. As the Court held:

> ...the FCC did not adequately justify why it based its interim plan on total toll revenues, as it did not establish a nexus between total toll revenues and the number of payphone-originated calls....[31]

Because there is no nexus between total toll revenues and payphone calls, the Commission must base compensation on some measure of payphone-originated calls.

Fourth, the Commission must address the issue of compensation for otherwise uncompensated 0+ and inmate calls. The Commission should decline to adopt any such plan. The principal beneficiaries of such a plan would be the local exchange carriers. However, local exchange carriers *already* receive compensation on "each and every completed [not to mention *uncompleted*] intrastate and interstate call from their payphone[s]" in the form access charges. Awarding additional compensation would do no more than confer a windfall on the local exchange carriers. It would certainly not constitute fair compensation.

In addition, the period during which the Bell companies (the nation's largest local exchange carriers) could even be eligible for interim compensation is less than six months. Such interim compensation could begin on April 15, and

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[31] *Id.*

the earliest, and would run only to October 7.[32] Yet, as described above,[33] to date, none of the Bell companies has demonstrated that they currently qualify for compensation. The results hardly seem worth the efforts.

Nonetheless, if the Commission is intent upon crafting an interim compensation plan for 0+ and inmate calls, it cannot model such a plan on the plan for compensation for subscriber 800 and access code calls. Only those carriers that actually handled 0+ and inmate calls received any economic benefit from those calls. As such, the Commission can only require carriers that transported such calls to pay compensation.[34] Other carriers simply receive no benefit from 0+ and inmate calls and there is absolutely no nexus because such other carriers' toll revenues or payphone-originated revenues on which to base a compensation obligation for 0+ and inmate calls.[35]

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32 Because the statute confers on the Bell companies the ability to participate with premises owners in the negotiation of contracts for the carriage of 0+ traffic from their payphones (*see* 47 U.S.C. § 276(b)(1)(C)), they are already free to negotiate for compensation for 0+ traffic. In these circumstances, there is ample justification for not providing compensation for 0+ calls.

33 *See supra* at 10-11 n.27.

34 *Cf.*, Order, ¶ 83 (justifying the "carrier pays" compensation mechanism because it "places the payment obligation on the primary economic beneficiary.").

35 If, however, the Commission decides to order compensation for 0+ and inmate calls, it may not limit the payment of such compensation solely to the Bell companies. Other exchange carriers, including Frontier's subsidiary, Rochester Telephone Corp. ("Rochester"), also permitted premises owners to select a presubscribed interexchange carrier for 0+ traffic. Thus, just like the Bell companies, Rochester also received no compensation for 0+ traffic carried by the presubscribed interexchange carriers.

Conclusion

For the foregoing reasons, the Commission should take action on remand in the manner suggested herein.

Respectfully submitted,

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August 25, 1997

Certificate of Service

I hereby certify that, on this 25th day of August, 1997, copies of the foregoing Comments of Frontier Corporation were served by first-class mail, postage prepaid, upon the parties on the attached service list.

Michael J. Shortley, III

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